

JUL 13 2006

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

The Leadership Forum

MUR 5751

SENSITIVE

GENERAL COUNSEL'S REPORT # 2

I. ACTIONS RECOMMENDED

Take no further action as to The Leadership Forum and close the file.

II. INTRODUCTION

This matter is one of the original "527 MURs" arising out of the 2004 election.

The Complainant alleged that The Leadership Forum ("TLF") was established to help specific Republican House candidates in the 2004 elections; and it had become a political committee by accepting "contributions" and making "expenditures" for the purpose of influencing specific upcoming federal elections. In response, TLF asserted that its focus was on nonfederal activities and denied any plans to coordinate its activities with any federal candidate or political party committee. TLF argued that the Complaint cited no evidence indicating that it had participated or intended to participate in any federal election

This matter was redesignated as MUR 5751 when the Commission severed

Respondent;

<sup>2</sup> The Complaint argued that TLF was established to continue the past role of the National Republican Congressional Committee ("NRCC") in spending soft money to elect Republican candidates in House. *Id.* at ¶¶ 29-30. That Complaint cited the transfer of \$1 million in nonfederal funds from the NRCC and the Leadership Forum's subsequent return of that money following questions about its legality. *See* MUR 5338, which concerned the Leadership Forum's receipt of \$1 million in soft money from the NRCC and subsequent return of the money, where the Commission concluded that the return of the money reflected a good-faith attempt to comply with the law. *See* MUR 5338 (Leadership Forum). First General Counsel's Report, at 21; MUR 5338 Certification (April 9, 2003) (no reason to believe The Leadership Forum violated 2 U.S.C. §§ 441(a) or 434(e)).

TLF's response, however, did not answer or foreclose questions about whether it may have received more than \$1,000 in contributions or made more than \$1,000 in expenditures, and thus triggered political committee status under the Act. The Commission therefore found reason to believe that TLF may have violated 2 U.S.C. §§ 433, 434, 441a(f) and 441b(a) by failing to register and report as a political committee, and by accepting contributions outside the limits and prohibitions of the Act.

The ensuing investigation into these allegations indicates that TLF did not accept any contributions as a result of solicitations indicating that funds received would be targeted to the election or defeat of any identified federal candidate. See TLF Subpoena Response at Attachment 1 and TLF solicitations at Attachment 2. Further, it appears that TLF's 2004 public communications did not identify any federal candidates, and that these communications consisted of voting information produced by state and local election officials. While directing what appears to have been a get-out-the-vote drive based on partisan voting registration may violate the 2 U.S.C. § 441b prohibition on corporate expenditures, based on the specific circumstances in this matter, we recommend that the Commission take no further action as to TLF and close the file.

### **III. FACTS**

TLF, which is not registered with the Commission as a political committee, was established on October 28, 2002. TLF's registration with the IRS under Section 527 of the Internal Revenue Code states that its purpose is to engage in "nonfederal political activities on state and local levels and to engage in dialogue on issues of importance to all Americans." See TLF Form 8871 at <http://www.irs.gov/charities/political/index.html>

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1 (Oct. 28, 2002). TLF's Articles of Incorporation expressly forbid it from engaging in  
2 "federal election activity" as defined by the Act.<sup>3</sup>

3 TLF filed regular reports with the IRS which reveal that: in 2002 it had receipts of  
4 \$1,000,000 (later returned - *See* First GCR in MUR 5338) and no reported disbursements;  
5 in 2003 it had receipts of \$225,000 and a single disbursement of \$1,000,000 (to return the  
6 2002 receipts); and in 2004 it had receipts of \$471,927 and disbursements of \$500,574.  
7 TLF reported disbursements totaling \$184,716 for 2005. TLF did not report any receipts  
8 for 2005, or any receipts or disbursements for the first quarter of 2006. *See* TLF's Form  
9 8872s at <http://forms.irs.gov/politicalOrgsSearch/search/submitBasicSearch.action> (June  
10 21, 2006). TLF recently confirmed that it has no plans for future activities, and intends to  
11 terminate its existence at the conclusion of this matter. *See* Attachment 3 at 1.

12 Information obtained in our investigation indicates that TLF's solicitations do not  
13 expressly advocate the election or defeat of any clearly identified federal candidate or  
14 clearly indicate that funds will be targeted to any candidate's election. *See* Attachment 2  
15 for a representative sampling of solicitations sent by TLF during the 2004 election cycle.  
16 They do, however, mention support of the Republican Party's issue agenda, as well as the  
17 group's planned efforts to counter efforts of "liberal 527s" or "liberal Democratic special  
18 interest groups" working to defeat Republican ideas and candidates in the 2004 election.

19 Further information obtained in the investigation indicates that none of TLF's  
20 disbursements were for public communications or other advertisements that clearly

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<sup>3</sup> During 2004, TLF's only reported political contribution was a \$1,200 contribution to the Missouri gubernatorial campaign of Matt Blunt.

1 identified a candidate for federal office.<sup>4</sup>

2 Instead, in 2004, TLF spent approximately \$400,000 on the reproduction and  
3 redistribution of information previously produced by state and local election officials  
4 regarding the locations and dates for early voting in Nevada, Colorado and New Mexico.<sup>5</sup>  
5 The materials included either state-specific or county-specific information, and based on  
6 the representative materials provided by TLF, it appears recipients received information  
7 specific to their location. The materials, which were reprinted without substantive  
8 modifications by TLF, did not reference any federal candidate or, for that matter, a  
9 political party that nominates federal candidates.

10 TLF engaged outside vendors to compile mailing lists and distribute the  
11 reproduced official voting information. The TLF vendors received a single oral  
12 instruction from TLF "to target registered voters in only four (ultimately three) states and,  
13 where possible, to target Republican households." Attachment 3 at 2. The vendors were  
14 not told to target supporters of any particular federal candidate or federal congressional  
15 district. *See id.*

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<sup>4</sup> TLF distributed statewide information on the dates for early voting opportunities, as well as the locations and hours of operations of early voting sites for specific counties. *See* Attachment 3 for a description of TLF's early voter programs and a representative sampling of program materials used by TLF during the 2004 election cycle. TLF disbursed \$110,815 for materials distributed in Nevada, \$170,861 for materials distributed in Colorado and \$118,684 for materials distributed in New Mexico. As noted below, TLF's remaining 2004 disbursements appear to have been for fundraising, legal fees and overhead expenses.

1 **IV. ANALYSIS**

2 **A. Political Committee Theory**

3 The Act defines a "political committee" as any committee, club, association, or  
4 other group of persons that receives "contributions" or makes "expenditures" for the  
5 purpose of influencing a federal election which aggregate in excess of \$1,000 during a  
6 calendar year. *See* 2 U.S.C. § 431(4)(A).<sup>6</sup>

7 1. TLF did not Accept More than \$1,000 in Contributions

8 TLF did not trigger the statutory threshold for political committee status by  
9 accepting over \$1,000 in contributions under the Act. The term "contribution" is defined  
10 to include any gift, subscription, loan, advance, or deposit of money or anything of value  
11 made by any person for the purpose of influencing any election for Federal office.  
12 2 U.S.C. § 431(8)(A)(i). *See also* *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295  
13 (2nd Cir. 1995) (where a statement in a solicitation "leaves no doubt that the funds  
14 contributed would be used to advocate [a candidate's election or] defeat at the polls, not  
15 simply to criticize his policies during the election year," proceeds from that solicitation  
16 are contributions). The TLF solicitations, however, do not clearly indicate that the funds

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<sup>6</sup>The Supreme Court has held that "[t]o fulfill the purposes of the Act" and avoid "reach[ing] groups engaged purely in issue discussion," only organizations whose major purpose is campaign activity can be considered political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79; *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) ("MCFL"). By law, a 527 organization is "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." *See* 26 U.S.C. § 527(e)(1). The "exempt function" of 527 organizations is the "function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State, or local public office or office in a political organization," or the election or selection of presidential or vice presidential electors. As discussed in the First General Counsel's Report at 11-12, individuals associated with TLF had made statements that could be viewed as suggesting the group had a major purpose consistent with political committee status. *See* Factual and Legal Analysis for The Leadership Forum, at 2.

1 received in response to the solicitations would be targeted to the election or defeat of a  
2 clearly identified candidate.<sup>7</sup> At most, TLF solicitations state that the group's focus was  
3 "on educating Republican voters on when and where early voting takes place in their  
4 county." See Attachment 2. Therefore, TLF does not appear to have received any  
5 "contributions" that might trigger political committee status.

6 2. TLF did not Make More than \$1,000 in Expenditures  
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8 TLF also did not trigger the statutory threshold for political committee status by  
9 making over \$1,000 in expenditures. The Act defines "expenditure" as "any purchase,  
10 payment, distribution, loan, advance, deposit, or gift of money or anything of value made  
11 by any person for the purpose of influencing any election for Federal office." 2 U.S.C.  
12 § 431(9)(A)(i). The investigation has revealed that TLF did not fund any public  
13 communications or advertisements that identified a candidate for federal office. See  
14 Attachments 1 and 3. As discussed above, TLF's public communications during the  
15 2004 election cycle were reproduced and redistributed voting information produced by  
16 state and local election officials that mention no federal candidates. A review of TLF's  
17 discovery responses and their IRS filings suggests that TLF's remaining disbursements  
18 were for expenses relating to fundraising, legal fees, and general administrative overhead.

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<sup>7</sup> In quoting a newspaper headline referencing the Democratic 527s' attempt to defeat President Bush, at least one TLF solicitation refers to a specific federal candidate, but not in a manner that either expressly advocates his election or, while a somewhat closer call, clearly indicates that funds received in response to the solicitation will be targeted to the reelection of President Bush. See Attachment 2 at p. 4.

**B. Corporate Expenditure Theory**

TLF is a corporation, and corporations are prohibited from making contributions or expenditures from their general treasury funds in connection with the election of any candidate for federal office. 2 U.S.C. § 441b(a). Commission regulations, however, allow corporations to make disbursements for communications beyond the restricted class under certain conditions. 11 C.F.R. § 114.4. Under these regulations, a corporation conducting a “get-out-the-vote” drive aimed at the general public cannot direct the drive “primarily to individuals registered with the political party favored by the corporation or labor organization.” 11 C.F.R. § 114.4(d)(3).<sup>8</sup>

TLF argues that its reproduction and distribution of official voting information that does not mention any federal candidates or issues should not be classified as part of a get-out-the-vote drive pursuant to 11 C.F.R. § 114.4(c)(2) that would be subject to the restrictions on targeting outlined in 11 C.F.R. § 114.4(d)(3). Instead, TLF argues that the reprinting and redistribution of voting information and instructional materials produced by official election administrators is allowed under 11 C.F.R. § 114.4(c)(3), and that this provision is not subject to the same restriction as applies to partisan targeting. *See id.* That provision states that a corporation “may distribute to the general public, or reprint in whole and distribute to the general public, any registration or voting information, such as instructional materials, which has been produced by the official election administrators.”

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<sup>8</sup> Commission regulations applicable to activities undertaken by organizations other than corporations or labor organizations subject to 2 U.S.C. § 441b and 11 C.F.R. § 114.4 provide that “[a]ny cost incurred for activity designed to encourage individuals to register to vote or to vote is not an expenditure if no effort is nor has been made to determine the party or candidate preference of individuals before encouraging them to register to vote, or to vote, except that corporations and labor organizations shall engage in such activity in accordance with 11 CFR 114.4 (c) and (d). *See also* 11 CFR 114.3(c)(4).” 11 C.F.R. § 100.133.

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1 See Attachment 4. TLF maintains that in planning its activities, it interpreted the  
2 redistribution of the official voting information under this provision as being “expressly  
3 designed NOT to constitute a get-out-the-vote communication” subject to 11 C.F.R.  
4 § 114.4(d). Attachment 3 at 2.

5 While we recognize that the regulation cited by TLF allows corporations to  
6 reproduce and distribute voting information produced by official election administrators,  
7 we believe that Sections 114.4(c)(2) and 114.4(d)(3), when read together, prohibit  
8 directing the distribution of such materials to members of a particular political party. By  
9 targeting the members of one political party in proximity to a general election, the re-  
10 distribution of such materials becomes the type of get-out-the-vote drive that is prohibited  
11 under Section 114.4(d)(3).

12 Although 11 C.F.R. § 114.4 does not define what constitutes a “get-out-the-vote  
13 drive,” in another context generally applicable to party committees (defining “Federal  
14 election activity”), Commission regulations define “get-out-the-vote activity” as  
15 “contacting registered voters by telephone, in person, or by other individualized means,  
16 to assist them in engaging in the act of voting.” 11 C.F.R. § 100.24(a)(3). In AO 2006-  
17 19 (Los Angeles County Democratic Party Central Committee) (“LACDP”), the  
18 Commission recently considered the question of whether certain communications would  
19 constitute a get-out-the-vote drive under 11 C.F.R. § 100.24. In that AO, the  
20 Commission concluded that communications by the LACDP to all registered Democrats  
21 in Long Beach County in connection with a municipal election held on the same date as a  
22 Democratic Party primary election, which included federal candidates, would not

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1 constitute a get-out-the-vote drive that would qualify as federal election activity. In  
2 reaching this conclusion, the Commission noted that the communications promoted only  
3 non-federal candidates, were made at least four days prior to the day on which the  
4 election would take place, and were not targeted to any subset of voters eligible to vote in  
5 the Democratic Primary, or individualized to the needs of particular voters.

6 In TLF's case, the communications included the dates and particular times and  
7 locations for early voting in three states, including early voting information for specific  
8 counties, which was intended to assist in and encourage early voting. Unlike the  
9 communications addressed in AO 2006-19 (LACDP), at least some of the  
10 communications sent by TLF appear to have arrived on, or just before, dates the voter  
11 actually could exercise the early voting opportunities that were the subject of the  
12 communication,<sup>9</sup> were targeted to only a subset of the individuals eligible to cast votes in  
13 the general election, and provided information that was particularized to the needs of  
14 individual recipients. Also unlike the communications in AO 2006-19, which did not  
15 provide the location of a particular recipient's polling place, the communications sent by  
16 TLF provided the address of locations where the recipient could go for early voting. The  
17 information was particularized since recipients received either information for their  
18 specific county or state, based on their location.

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<sup>9</sup> Information ascertained during the investigation indicates that, as of the middle of October 2004, TLF was in the process of mailing the early voting information to Republican households in the target states. TLF has stated that it did not maintain a list of the actual recipients of the mailings; therefore, it is not possible to identify whether specific recipients received the early voting information during the time period when early voting was available in their state. Based on the early voting dates in late October, the fact that TLF did not make disbursements for the reproduction and distribution of the early voting information until mid-October 2004, and TLF's statement that the mailings were in progress during that time period, it appears likely that at least some recipients received the communications from TLF on or just prior to the dates available for early voting in their states.

1 By directing its vendors to target Republican households and including county-  
2 specific early voting information for some recipients, TLF provided specific information  
3 to only a subset of the voters eligible to vote in the general election in the target states.  
4 This provides a basis for concluding that TLF was engaged in an effort to encourage  
5 registered Republican voters to vote early in the three states where it made  
6 disbursements; and that such activity, by virtue of the partisan targeting, may be viewed  
7 as a get-out-the-vote drive under 11 C.F.R. § 114.4(d)(3).

8 **C. Conclusion**

9 Based on the totality of the circumstances, we believe that the Commission  
10 should, as a matter of prosecutorial discretion, take no further action in this matter. As  
11 discussed above, there is a basis for concluding that TLF acted in the good faith belief  
12 that its reproduction and redistribution of voting information produced by state and local  
13 election officials did not constitute a get-out-the-vote drive and was permissible under the  
14 Commission's regulations. Further, as noted above, since 2004 TLF has not engaged in  
15 any activity, other than efforts to wind down its operations, and has indicated that it does  
16 not intend to engage in any future activities. *See* Attachment 3 at 1. Accordingly, TLF  
17 does not raise any significant concerns for us about the potential for future violations of  
18 the Act or regulations. Given the overall circumstances of the violation, particularly the  
19 absence of any reference to a clearly identified federal, we recommend that the  
20 Commission take no further action with respect to The Leadership Forum and close the  
21 file. *See Heckler v. Cheney*, 470 U.S. 821 (1985).

V. RECOMMENDATIONS

1. Take no further action as to The Leadership Forum;
2. Close the file; and
3. Approve the appropriate letter.

7/13/00  
Date

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Attachments:

- 1.
2. Representative sampling of TLF solicitations
3. Representative sampling of TLF early voter program materials
4. Reprint of 11 C.F.R. § 114.4(c) and (d)